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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. [redacted] 123

OKEMAH NATIONAL BANK, a Corporation,
Petitioner,

VERSUS

EARL R. WISEMAN, District Director
of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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June, 1958.

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-8780

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In the
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OKEMAH NATIONAL BANK, a Corporation,
Petitioner,

VERSUS

EARL R. WISEMAN, District Director
of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Okemah National Bank, a corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on March 10, 1958, reported 253 F.2d 223.

OPINIONS BELOW

1. The District Court's Findings of Fact and Conclusions of Law, Filed April 17, 1957 (Appendix A, *infra*, page i).

2. The Opinion of the Court of Appeals for the Tenth Circuit on March 10, 1958, reported 253 F.2d 223 (Appendix A, *infra*, page ii).

JURISDICTION

Petition for rehearing denied April 11, 1958. Jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

The question presented is whether the opinion and judgment of the United States Court of Appeals, Tenth Circuit, is in conflict with the decrees of this Honorable Court when it held that the expense incurred in connection with a guaranty contract, entered into by the appellant bank to obtain deposits in 1925, was not an "ordinary" business expense deduction under Section 23(a)(1) of the Internal Revenue Code of 1939.

DECREES IN QUESTION

Commissioner v. *Heiniger*, 320 U.S. 467, 88 L. Ed. 171, 64 Sup. Ct 249; *Welch* v. *Helvering*, 290 U.S. 113, 78 L. Ed. 214, 54 Sup. Ct. 8; and *Deputy* v. *duPont*, 308 U.S. 488, 60 Sup. Ct. 363, 84 L. Ed. 416.

STATUTE INVOLVED

"Internal Revenue Code of 1939

"Section 23. In Computing Net Income There Shall Be Allowed as Deductions—

"(a) Expenses—

(1) Trade or Business Expenses—

(A) IN GENERAL. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *."

REGULATION

Regulation 118, Sec. 39.23(a)(1), Business Expense.

"Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or credit under provisions of law other than subsection (a) of Section 23 * * *. The full amount of the allowable deduction for ordinary and necessary expenses in carrying on a business is nevertheless deductible, even though such expenses exceed the gross income derived during taxable year from such business * * *."

STATEMENT OF THE CASE

Summary

In 1925, the board of directors and officers of the Okemah National Bank wanted the benefit of the deposits of the surplus funds of two express trusts. The board, which included the bank's officers, acting formally or informally, but unanimously, orally agreed with its president, A. J. Martin, that if he would execute a bond on said trustees and obtain a control contract with said trustees, so that the bank could get the benefit of the surplus deposits, that the bank would hold Martin harmless. Martin executed the contracts. The bank got the benefits it sought under the contracts. Martin was later sued and a judgment was rendered against him as a surety. The board of directors in a formal meeting unanimously passed a resolu-

tion authorizing the payment of the judgment and costs. Said judgment and costs were paid by the bank in 1950. The Commissioner denied said payment as an ordinary and necessary business expense deduction under 23(a)(1) of the Internal Revenue Code.

The trial court held against your petitioner. The Circuit Court affirmed the trial court's judgment and held that it was unnecessary to explore and determine whether the guaranty contract with Martin was an enforceable obligation. That the transaction giving rise to the expense was not normal, usual and customary and therefore the expense was not "ordinary" under Section 23(a)(1) of the Code.

DETAILED STATEMENT

The essential facts above summarized, all of which are undisputed in the record, a part were stipulated and the balance conceded at trial. The following were stipulated (R. 20):

> "On or about April 15, 1925, A. J. Martin executed a surety bond on the Trustees, Hill Moore and Washington Grayson, in favor of the trust estate of two unrestricted Indians, Cuessehta Yarhola and Nancy Severs, and at the same time, A. J. Martin also entered into a separate written contract with the Trustees, Hill Moore and Washington Grayson, wherein A. J. Martin obtained joint control of the Estates, with power to disapprove any transaction of the Trustees in executing the trusts. The bond and control contract were in force from April 15, 1925 to December 19, 1929.

"That at the time the bond was executed, A. J. Martin, V. K. Chowning and Burr Randles were the Officers, Directors and owners of the majority (384 shares of 600 shares) of the capital stock outstanding in the plaintiff bank.

"That during the term of the suretyship, the trusts maintained an average monthly balance on deposit in the plaintiff bank of $43,635.11, which when first deposited constituted 2.75 percentage of plaintiff's total demand deposits and which at the time withdrawn constituted 3.88 percentage of said demand deposits. That the plaintiff bank's deposits as of December 31 of the several years are as follows:

1925	$ 1,587,448.00
1926	1,323,000.00
1927	1,186,000.00
1928	1,301,000.00
1929	1,125,000.00

"That at the time when A. J. Martin entered into the control contract and the suretyship contract, the surplus funds of the trusts were kept in a Muskogee bank, and as soon as the suretyship ended the surplus funds were removed from the plaintiff bank and deposited in a Weleetka bank.

"On November 23, 1940, an action was filed in the United States District Court of Muskogee, by the guardian of minor heirs of the Indian beneficiaries of the Trusts against said Trustees and plaintiff bank, A. J. Martin, V. K. Chowning and Burr Randles, *et al.*, alleging conspiracy to defraud and fraud in the handling of the trust funds. The plaintiff bank employed attorneys to defend the action.

"These expenses were claimed as a deduction in determining the plaintiff's taxable income in said years when expended.

"The plaintiff bank, V. K. Chowning, and Burr Randles were dismissed from the action on February 10, 1947.

"After years of litigation, the action against the plaintiff bank, V. K. Chowning and Burr Randles was dismissed. An order was entered directing the Trustees to account on each transaction during the term of the suretyship of A. J. Martin. Trustee Hill Moore was deceased and his estate was not made a party to the action. Washington Grayson was financially irresponsible and did not defend the action. Mr. A. J. Martin testified from memory and limited records on all the transactions that occurred during the suretyship. Mr. Martin was unable to satisfy the court that two of the many loans made by the trustees were providently made and the losses were charged back against the trustees. Mr. Martin was unable to show the amount of the services performed and the value of said services of the trustees and although the amounts paid were within the amounts allowable in the trust agreements, the court found that they were disproportionate and they were charged back against the trustees. The Court found no fraud or conspiracy on the part of the trustees during Mr. Martin's suretyship and exonerated Mr. Martin from the alleged fraudulent scheme or conspiracy charge but held him liable on the surety bond for the losses on the two loans and the fees paid the trustees in the sum of $14,000.00. Judgment was formally entered on August 16, 1950.

"On October 25, 1950, a special meeting of the Board of Directors of the plaintiff bank was held. A copy of said minutes of this meeting is hereto attached, marked Exhibit 2, and made a part of this stipulation.

"SPECIAL MEETING.

"Special Meeting of the Board of Directors of the Okemah National Bank, *Okeman,* Oklahoma was held on October 25, 1950.

"Directors present, *towit:* Burr Randles, V. K. Chowning, A. J. Martin and A. C. Martin.

"On motion, duly made and unanimously approved the Board authorized the payment of $14,000.00 in satisfaction of judgment in Case #443-Civil, George *Chisolm, et al* vs. H. G. House, *et al* in United States District Court for the Eastern District of Oklahoma. The payment of all attorney fees in connection with this litigation was approved by the Board.

"On Motion, the meeting adjourned.

"Signed A. J. Martin
President

"Attest:

"Signed A. C. Martin
Secretary

"In 1950, the plaintiff bank paid the $14,000.00 judgment which was entered against A. J. Martin as surety on the bond, and also paid $2,199.99 for attorney fees and court costs incurred in the defense of the action. The payments were taken as a deduction against gross income of the bank in said year in determining the plaintiff bank's income for said year. The Commissioner disallowed the deduction of the $16,199.99 and said disallowance is the basis of the assessment, the correctness of which is to be determined in this action."

FACTS CONCEDED AT TRIAL

A jury was impanelled to try the only issue of fact that could not be stipulated. That issue was whether Martin executed the bond and contract primarily for the benefit of the bank and upon the request of the board, which included its officers, and with the understanding that the bank would hold Martin harmless on the bond and that the expense, if any, would be paid out of the earnings of the bank.

This issue was presented to the jury in the opening statements of counsel for the respective parties. The Government contended that the bank's promise was without consideration and was merely an agreement to pay Martin's debts.

When the plaintiff rested its case, the Government demurred to the evidence (R. 18-19). The court overuled the demurrer. The Government stated it had no positive evidence. The court stated that the evidence was undisputed and asked counsel for the respective parties if they thought there was any issue to be presented to the jury. After the trial court had overruled the demurrer to the evidence, the Government did not disagree with the court in taking the issue away from the jury's deliberation and thereby conceded the only issue of fact to be presented to the jury.

So all the facts are stipulated or conceded in trial.

REASONS FOR GRANTING THE WRIT

Said Appellate Court failed to take into account the circumstances and business reasons under which the bank incurred these expenses. To say that this course of conduct and the expenses which it involved were extraordinary or unnecessary would be to ignore the ways of conduct and forms of speech prevailing in the business world.

The decision of the Court of Appeals is in conflict with the decrees of this Honorable Court in *Commissioner* v. *Heiniger*, 320 U.S. 467, and *Welch* v. *Helvering*, 290 U.S. 113, when it held that because of the unusual nature of the transaction which gave rise to the judgment and resulting attorney fees that said expenses were not ordinary business expense under Section 23(a)(1) of the Internal Revenue Code.

Okemah National Bank Had the Power to Make the Guaranty Agreement

National Banks are granted certain specific powers. One of which is "to receive deposits" and another is to "make contracts." They are also empowered "to exercise such incidental powers as shall be necessary to carry on 'the business of banking'." Rev. Stat. Sec. 5136 (Comp. Stat., Sec. 966[7]), or Title 12, Sec. 24, U.S.C.A.

Obtaining deposits has always been recognized as a function of a bank. This Court in discussing these incidental powers in *First National Bank* v. *National Bank*, 92 U.S. 122, 23 L. Ed. 679, had this to say:

"These incidental powers are such 'as are required to meet all legitimate demands of the authorized business, and enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently'."

In Vol. 7, Am. Jur., Sec. 158, p. 121, it is stated:

"National Banks have power to adopt reasonable and appropriate measures within the general scope of their charters for carrying on the banking business."

See also *Western National Bank* v. *Armstrong*, 152 U.S. 346, 351, 38 L. Ed. 470, 473; *Eastern T. Bank v. National Bank*, C.C. Vt., 22 Fed. 186; Miches, Banks and Banking, Vol. 5A, Ch. 9, Sec. 12.

Contracts entered into to obtain deposits are enforceable because they are within the powers granted to national banks. *Boyd* v. *First National Bank*, 128 Ky. 468, 108 S.W. 360; *State of Nebraska* v. *First National Bank of Orleans, et al.*, 88 Fed. 947; *Eastern T. Bank* v. *Vermont National Bank*, C.C. Vt., *supra; U.S.F. & G.* v. *First State Bank, et al.*, 116 Miss. 239, 70 So. 747; Miches, Banks and Banking, *supra*, Vol. 5A, Ch. 9, Sec. 12.

National banks may enter into indemnity agreements to obtain deposits or to promote their authorized businesses. *U.S.F. & G.* v. *First State Bank, et al., supra; Second National Bank of Parkersburg, W. Va.* v. *U.S.F. & G.*, 266 Fed. 489, *dismissed*, 41 Sup. Ct. 10, 254 U.S. 660, 65 L. Ed. 462.

A national bank, through its officers and directors, is authorized, in the regular course of its business, to agree to supervise the administration of the trust funds under its custody and control, as herein, and be liable to the surety

on the bond for its own misconduct, even though it may not act as technical trustee. 7 Am. Jur., Sec. 191, 147; *Kerfoot* v. *Farmers & Mr. Bank*, 218 U.S. 281, 54 L. Ed. 1042, 31 Sup. Ct. 14; *Miller* v. *Kind*, 223 U.S. 505, 56 L. Ed. 528, 32 Sup. Ct. 243.

Okemah National Bank Was Liable on the Contract

The bank received the benefits of the contract.

The bank obtained the benefits of the executed contract, which was not illegal or immoral in itself, and the bank could not accept the benefits and then avoid the liabilities. *Oklahoma City National Bank* v. *Ezzard*, 58 Okla. 251, 159 Pac. 267, *cert. den.*, 243 U.S. 631, 61 L. Ed. 938, 37 Sup. Ct. 477; *Crowder State Bank* v. *Aetna Powder Co.*, 41 Okla. 394, 138 Pac. 392; *Shawnee National Bank* v. *Purcell W. Grocery*, 34 Okla. 34, 124 Pac. 603; *Gilbert* v. *Citizens National Bank of Chickasha*, 61 Okla. 112, 160 Pac. 635; *Rainbow Oil & Gas Co.* v. *Barton*, 70 Okla. 271, 173 Pac. 1135; *First National Bank of Ada* v. *Womack*, 56 Okla. 359, 156 Pac. 207; *Citizens National Bank of Denison, Texas* v. *Drumright State Bank*, 116 Okla. 213, 244 Pac. 178; *National Gas Co.* v. *Douglas*, 170 Okla. 284, 39 P.2d 578, 101 A.L.R. 144; *Bennett et al.* v. *W. A. Gage & Co.*, 74 Okla. 69, 176 Pac. 744; *Ewing et al.* v. *Board of Comm'rs of Ellis County*, 53 Okla. 250, 156 Pac. 229; *Barnsdall National Bank* v. *Dykes*, 136 Okla. 226, 277 Pac. 219.

The Board's Resolution, an Enforceable Executory Promise

The Board of Director's resolution of October 25, 1950, constituted an executory promise, by the bank, to pay the $16,199.99, and said promise is supported by a previous benefit of a material and pecuniary kind, and although if we admit that there was no antecedent contract or legal liability, perfect or imperfect, said promise will constitute an enforceable obligation against the bank upon which Martin could have recovered.

The Government contended that since there was no record of a formal resolution of the Board of Directors, passed in regular meeting, authorizing said agreement, or no evidence of a written contract in the bank's files or records, to show the existence of the liability, that there was no enforceable agreement binding on the bank to pay the loss and to hold Martin harmless on the surety bond. The evidence shows that all the officers and directors of the bank knew and acquiesced in the agreement although no formal contract was prepared. Martin testified that he executed the bond relying on the bank's promise to hold him harmless and with the understanding that the loss, if any, would be paid out of the bank's profits. The fact that the bank wanted the deposits, thought that they were valuable to the bank, that Martin executed the contract relying on the bank's promise, and that the Board of Directors unanimously voted to pay the costs and judgment, indicates that the officers and directors recognized that the loss was the bank's loss under the prior agreement relied on

by Martin. The bank got the anticipated benefits and the bank paid the unexpected losses.

The trend of modern authorities is to the effect that where services or other consideration moving from the promisee conferred an actual, material, or pecuniary benefit on the promisor, and not merely a detriment to the promisee, and the promisee expected to be compensated therefor and did not intend it as a mere gift or gratuity, and the benefit received had not constituted the consideration for another promise already performed or still legally enforceable, a moral obligation arises which will support a subsequent executory promise where there was originally no contract, perfect or imperfect, obligating the promisor.

We wish to cite *Park Falls State Bank* v. *William G. Fordyce*, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339. This case presents every question advanced by the Government herein. In said case, the board of directors and officers orally agreed with Fordyce, one of the board of directors, that if he would purchase from the bank the past due notes of a bankrupt debtor of the bank, that the bank would hold him harmless of any loss on the notes in the transaction. The bank's debtor was thrown into bankruptcy and Fordyce called upon the bank to make good on its contract or agreement. The board of directors, in a formal meeting, passed a resolution providing for the repurchase of the notes from Fordyce. Fordyce was reimbursed. Later there was a shift in the bank's stock and the stockholders directed the directors to sue Fordyce to recover the money. There the Court layed down the rule applicable herein.

This Rule Is the Law in the State of Oklahoma

The rule as announced in *Park Falls State Bank* v. *Fordyce, supra,* is the law of the State of Oklahoma as announced in *Kaiser* v. *Faden* (Okla.), 280 P.2d 728. It is followed by the Court of Appeals, Tenth Circuit, in *Old American Life Insurance Company* v. *Biggers,* 172 F.2d 495, citing many authorities.

The Appellant Bank Was Not a Volunteer, or Engaging in the Suretyship Business

The bank was not engaging in the surety business as a business. The bank entered into the contract and received a valuable consideration. The bank could not be and was not a volunteer. Banks like individuals, or other corporations, very often enter into guaranty contracts to promote or protect their businesses. There are thousands of cases in the reported cases, adjudicating the rights of banks on guaranty contracts, to say nothing of the hundreds of thousands of cases that do not reach the Courts. We cite only a few. *Second National Bank of Parkersburg, W. V.* v. *U.S.F. & G., supra; U.S.F. & G.* v. *First State Bank, supra; American Surety Company* v. *Phillippine National Bank,* 156 N.E. 634.

The Circiut Court seemed to think that Martin should have made the bond and rendered the service for the bank without compensation. That since Martin got the premiums as a surety that he was not entitled to the protection pledged by the bank. Thus Martin would have been in the same position as this Court found du Pont in *Deputy* v. *du Pont,*

308 U.S. 488, a volunteer. Then the expense or loss suffered by Martin would not have been deductible in his return under *Burnett* v. *Clark*, 287 U.S. 410; *Deputy* v. *du Pont*, *supra*. As a surety, and under the guaranty agreement, Martin was entitled to the premiums. 12 Am. Jur., Corporations, Sec. 1030, pp. 976, 977.

CONCLUSION

The facts in this case are not *sui generis*. Clarification seems to be necessary. The question presented has a broad application and interest. The interpretation of this section of the statute seems to need clarification. As stated by Rabkin and Johnson, Federal Income, Gift and Estate Taxation, Vol. I, Paragraph 302(3), Ordinary and necessary, at page 309:

> "Thus 'ordinary and necessary' seems often to be merely a convenient label for disposing of an issue which merits more percise consideration."

We submit that this Honorable Court should clarify the problem by issuing the writ and reversing the judgment of the Court of Appeals in this proceeding.

Respectfully submitted,

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June, 1958.

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA, FILED APRIL 17, 1957, ROSS RIZLEY, DISTRICT JUDGE:

FINDINGS OF FACT

Considering the Stipulation filed by the parties (Plaintiff's Exhibit 1), together with the evidence adduced at trial, in the light most favorable to the plaintiff, the Court is of the view that all such evidence is wholly insufficient to establish a *prima facie* showing of plaintiff's entitlement to the business-expense deductions claimed by it and disallowed by the Commissioner, or to raise any substantial issues of fact for jury determination in respect to such claimed deductions.

CONCLUSIONS OF LAW

1. The evidence of the plaintiff is insufficient, as a matter of law, to establish a *prima facie* case, or to present issues of fact for jury determination, relative to the nature of the obligations giving rise to the claimed deductions under Section 23, Internal Revenue Code of 1939, as amended, 26 U.S.C. (1952 Ed.) Section 23. *Cf. Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590 (1943); *Deputy* v. *du Pont*, 308 U.S. 488 (1940); *Ecco High Frequency Corp.* v. *Commissioner* (10th Cir. 1948), 167 F.2d 583, *cert. denied* 335 U.S. 825.

2. The Complaint of the plaintiff should be dismissed.

[APPENDIX A]

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, MARCH 10, 1958:

BRATTON, Chief Judge:

Okemah National Bank, of Okemah, Oklahoma, instituted this action against the Director of Internal Revenue for the District of Oklahoma. The case was tried to a jury. At the conclusion of the evidence, the court withdrew the case from the jury and later entered judgment dismissing the action. The bank appealed.

These facts were established at the trial, some by stipulation and some by evidence. In 1925, A. J. Martin was president and a director of the bank; V. K. Chowning and Burr Randles were directors; the three of them owned a majority of the outstanding stock; and they controlled the bank. Hill Moore and Washington Grayson were trustees of the trust estates of two Indians. On or about April 15, 1925, Martin executed a surety bond covering the trustees; and at the same time he also executed a separate written agreement with them in which he obtained joint control of the trust estates with power to disapprove any transaction of the trustees in connection with the administration of the trusts. The bond and control contract were in force from April, 1925, to December, 1929. Martin received regularly an annual premium of $700 for having signed the bond. Martin, Chowning, and Randles executed an agreement in writing which provided that in the event Martin should be required to make any payment for liability upon the bond, Chowning and Randles would reimburse him in proportion as they had shared in the distribution of the premium paid to Martin for having signed such bond. From year to year, Chowning and Randles each received $233.33 of such premiums; Martin retained the remainder; and the three individuals reported such amounts in their income tax returns, respectively. The bank neither received nor

reported any portion of such premiums as income. During the term of suretyship, the trusts maintained an average monthly balance on deposit in the bank of $43,635.11. Such deposits ranged in point of percentage from 2.75 to 3.88 of the total demand deposits in the bank. At the time Martin entered into the surety contract and the control contract, the surplus funds of the trust estates were kept in a bank at Muskogee, Oklahoma, and shortly after the suretyship ended the surplus funds were removed to a bank at Weleetka, Oklahoma. In 1940, the then guardian of the minor heirs of the Indian beneficiaries of the trusts instituted an action against the trustees, the bank, Martin, Chowning, Randles, and others, alleging a conspiracy to defraud and fraud in the handling of the trust funds. The bank, Chowning, and Randles were dismissed from the action. The action then proceeded against the trustees and Martin on the bond. In 1950, judgment in the sum of $14,000 and costs was entered against Martin; and in October of that year the bank paid the judgment and also paid $2,199.99 for attorneys' fees and court costs incurred in the defense of the action. In its income tax return for the year 1950, the bank claimed as a deduction from gross income the amount in the aggregate disbursed in payment of the judgment and for attorneys' fees. The Commissioner of Internal Revenue disallowed the deduction; a deficiency assessment followed; the assessment was paid under protest; and this suit was seasonably instituted to recover.

Through iteration and frequent reiteration, it has become elementary that deductions from gross income are not a matter of right and they do not turn upon equitable consideration. They are a matter exclusively of legislative grace. And a taxpayer claiming a deduction must bring himself squarely within the terms of a statute expressly authorizing it. *New Colonial Ice Co.* v. *Helvering,* 292 U.S. 435; *White* v. *United States,* 305 U.S. 281; *Deputy* v. *du Pont,* 308 U.S. 488; *Hales-Mullaly, Inc.* v. *Commissioner,* 131 F.

[APPENDIX A]

(2d) 509; *F. A. Gillespie & Sons Co.* v. *Commissioner*, 154 F.(2d) 913, *certiorari denied*, 329 U.S. 781; *Chicago Mines Co.* v. *Commissioner*, 164 F.(2d) 785, *certiorari denied*, 333 U.S. 881; *United States* v. *Akin*, 248 F.(2d) 742.

The bank relies upon section 23(a)(1)(A) of the Internal Revenue Code of 1939, 26 U.S.C.A. § 23(a)(1)(A), to sustain the deduction in question. The statute authorizes a deduction from gross income for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. But it does not authorize as a deduction all expenses of every kind and character paid or incurred. It is expressly limited to reach to ordinary and necessary expenses paid or incurred in carrying on a trade or business. And in order to come within the statute an expense must be both ordinary and necessary in relation to the kind of trade or business in which the taxpayer is engaged. Therefore, in order to come within the statute, the amount which the bank paid out in settlement of the judgment and for attorneys' fees must have been both ordinary and necessary in relation to the business of banking. *Welch* v. *Helvering*, 290 U.S. 111; *Deputy* v. *duPont*, *supra*; *Hales-Mullaly, Inc.* v. *Commissioner*, *supra*; *United States* v. *Akin*, *supra*.

The disbursement made by the bank was in payment of the judgment rendered against Martin and for attorneys' fees in the litigation culminating in such judgment. And it is well settled that payment of the debt or obligation of another is not an ordinary and necessary expense which may be deducted from gross income. *Welch* v. *Commissioner*, *supra*; *Blackwell Oil & Gas Co.* v. *Commissioner*, 60 F.(2d) 257; *A. Giurlani & Bro.* v. *Commissioner*, 119 F.(2d) 852. But the bank urges the contention that as between the contracting parties, it was an undisclosed principal on the bond. The substance of the argument is that the bank agreed to protect Martin against loss on the bond; that in doing so, it assumed the responsibility of a principal on the bond

in order to obtain the benefit of the deposits of the surplus funds of the trusts; that the arrangement was one designed to promote the business of the bank; and that therefore the disbursements made by the bank in payment of the judgment against Martin and for attorneys' fees in defending Martin against liability were ordinary and necessary expenses incurred and paid in connection with the business of the bank. The bank was not an undisclosed principal on the bond. Martin was the principal. He was paid a commission or premium for assuming the responsibility. And Martin, Chowning, and Randles agreed in writing that in the event Martin was called upon to make payment of liability incurred under the bond, Chowning and Randles should reimburse him in the proportion in which the three had shared in the distribution of the premium paid to Martin for having signed the bond.

The bank advances the further contention that it effectively agreed and obligated itself to protect Martin against liability or loss upon the bond and that therefore the amount disbursed in the discharge of the judgment and for attorneys' fees was paid as necessary and ordinary expenses incurred in connection with the business of the bank. There was no written evidence of such an agreement or obligation, either in the minutes of the board of directors of the bank or otherwise. There was evidence tending to show that Martin, Chowning, and Randles agreed verbally in the course of discussion that the bank would protect Martin. But it is unnecessary to explore or determine the question whether the bank was under an enforceable obligation to protect Martin against liability or loss upon the bond. Ordinary as used in the statute has the connotation of normal, customary, and usual. *Deputy* v. *du Pont, supra.* The transaction giving rise to the execution of the bond and later resulting in payment of the judgment and outlay for attorneys' fees was not normal, customary, or usual in the field of bank practices. On the contrary, it was ex-

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traordinary and fell well outside the perimeter of conventional bank practices. And therefore the amount which the bank paid out was not ordinary expense incurred and paid in the conduct of the business of the bank, within the intent and meaning of section 23, supra.

Other contentions are urged for reversal of the judgment but examination of them makes it plain that they are without merit and do not call for discussion.

The judgment is

AFFIRMED.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 123

OKEMAH NATIONAL BANK, a Corporation, PETITIONER

v.

EARL R. WISEMAN, District Director of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 6-7, Pet. App. i) are not officially reported. The opinion of the Court of Appeals (Pet. App. ii-vi) is reported at 253 F. 2d 223.

JURISDICTION

The judgment of the Court of Appeals was entered March 10, 1958. (Tr. 12.) Rehearing was denied April 11, 1958. (Tr. 30.) The petition for certiorari was filed on June 23, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the record warrants the District Court's determination, affirmed by the court below, that amounts paid by the taxpayer corporation (a bank), in satisfaction of a personal judgment rendered against its president and for attorneys' fees incurred in the litigation culminating in the judgment, were not deductible as ordinary and necessary expenses of the taxpayer corporation under Section 23(a)(1)(A) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*——

(1) *Trade or business expenses.*——

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.23(a)-1. *Business Expenses.*—Business expenses deductible from gross income include the ordinary and necessary expenditures directly con-

nected with or pertaining to the taxpayer's trade or business, except the classes of items which are deductible under sections 23(b) to 23(z), inclusive, and the regulations thereunder. * * *

STATEMENT

This case arises out of a suit by the petitioner, Okemah National Bank, for a refund of 1950 income taxes in the sum of $8,479.98, based on a claim that amounts paid by the bank on the personal liability of its president, as surety for the trustees of an individual trust, and deducted from the bank's gross income, were erroneously disallowed by the Commissioner of Internal Revenue. (R. 1-3.) The case was heard on a stipulation of facts (R. 20-23) and testimony (R. 8-19).

In 1925, Martin, Chowning, and Randles were the officers, directors and majority stockholders of the bank. Martin, the president, executed a surety bond covering the trustees of a trust in favor of two Indians. Chowning and Randles agreed to reimburse Martin for any payments he might have to make on the bond, and the three men divided the premiums paid for the bond. The bank did not receive any premiums. During the period of the bond from 1925 to 1929, the trust funds were deposited in the bank and amounted to 2.75% to 3.88% of the bank's total demand deposits. When the suretyship ended, the trust funds were removed to another bank.

In 1940, the beneficiaries of the trust sued the trustees, Martin, Chowning, Randles and the bank for alleged conspiracy to defraud and fraud in the handling of the trust funds. The bank, Chowning and Randles were dismissed from the action, which proceeded

against Martin alone, one trustee being deceased and the other financially irresponsible. In 1950, the court found no fraud or conspiracy, but did find improvident management on the part of the trustees and held Martin liable on his surety bond for the loss suffered by the trust in the sum of $14,000. The bank paid the $14,000 judgment against Martin plus $2,199.99 for attorneys fees and court costs incurred in the defense of the action.

The testimony related to the bank's claim that, in order to secure for itself the benefit of the deposit of the trust funds, it had agreed to reimburse Martin for any liability incurred by him on the surety bond. There was, however, no such written agreement and no minutes of any such agreement, and the testimony of the bank directors as to the existence of an oral agreement for reimbursement or guaranty by the bank was conflicting. (R. 15, 16-17, 18.) The District Court found in favor of the defendant and dismissed the action. (R. 6-7.) The Court of Appeals affirmed. (Pet. App. ii-vi.)

ARGUMENT

The decision below is correct, and there is no conflict. This case presents a question of fact, and the concurrent findings of both courts below, amply supported by the record, do not warrant further review.

1. Section 23(a)(1)(A) of the Internal Revenue Code of 1939, *supra,* p. 2, limits deductible business expenses to "ordinary and necessary" expenses paid or incurred in carrying on the taxpayer's business. See also Section 29.23(a)-1 of Treasury Regulations 111, *supra,* pp. 2-3. The general principles for determining whether a business expense qualifies for deduction

under that section are settled. The expense must be both ordinary and necessary in relation to the kind of business in which the taxpayer is engaged; to be "ordinary", it must be normal or customary, in the sense that it is of common or frequent occurrence in the kind of business involved; and whether a claimed business expense deduction meets these tests turns upon the particular facts of each case. *Welch* v. *Helvering,* 290 U.S. 111; *Deputy* v. *du Pont,* 308 U.S. 488; *Commissioner* v. *Heininger,* 320 U.S. 467.

The record fully warrants the trial court's conclusion, affirmed by the court below, that the expenditure here in question—amounts paid by a banking corporation to satisfy a personal judgment rendered against its president as a surety for trustees, on account of a breach of the trust, and to defray the legal expenses in defending the lawsuit which led to the judgment—was not an "ordinary and necessary" expense incurred in carrying on a banking business. As the court below pointed out (Pet. App. iv-v), the taxpayer bank was not even obligated to make the payment, and it is established that a voluntary payment of another's debt is not deductible as an ordinary and necessary business expense. *Welch* v. *Helvering, supra; Ecco High Frequency Corp.* v. *Commissioner,* 167 F. 2d 583 (C.A. 2d), certiorari denied, 335 U.S. 825; *Hales-Mullaly, Inc.,* v. *Commissioner,* 131 F. 2d 509 (C.A. 10th); *A. Giurlani & Bro.* v. *Commissioner,* 119 F. 2d 852 (C.A. 9th). Even assuming, as taxpayer insists (Pet. 11-13), that it contractually obligated itself to make the payment, "The mere fact that the expense was incurred under contractual obligation does not of course make it the equivalent of a rightful deduction under § 23(a)."

Interstate Transit Lines v. *Commissioner*, 319 U.S. 590, 594. See also *Deputy* v. *du Pont, supra* p. 496. Nor did the business necessity or expediency of incurring the expense, or even the fact that it proved beneficial, qualify it for deduction, as taxpayer also assumes. "For Congress has not decreed that all necessary expenses may be deducted. Though plainly necessary they cannot be allowed unless they are also ordinary." *Deputy* v. *du Pont, supra*, p. 497. This means that (p. 495) "the transaction which gives rise to it must be of common or frequent occurrence in the type of business involved." See also *Welch* v. *Helvering, supra*, p. 114. As the court below observed (Pet. App. v-vi), the expense in question, far from being the kind commonly or customarily incurred by banks, "was extraordinary and fell well outside the perimeter of conventional bank practices." See also 7 Michie, *Banks and Banking* (1944), c. 15, Sec. 163.[1]

2. There is no basis for taxpayer's assertion (Pet. 9) that the decision below conflicts with *Welch* v. *Helvering*, 290 U.S. 111, and *Commissioner* v. *Heininger*, 320 U.S. 467. As is plain from its opinion, the court below applied the principles enunciated in those cases to the facts of this case. Its decision is in complete accord with that in the *Welch* case, where payments by a taxpayer to creditors of a bankrupt corporation of which he had been an officer, in order to reestablish his credit relations with former customers, were held not

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[1] The state court decisions upon which taxpayer relies (Pet. 11) merely stand for the proposition that a banking or other corporation may be liable on a contract where it has received benefits therefrom even though the contract is *ultra vires* and "outside of its legitimate business." See, *e.g.*, *Crowder State Bank* v. *Aetna Powder Co.*, 41 Okla. 394.

to be "ordinary," notwithstanding that they were necessary for the development of the taxpayer's business. In the *Heininger* case, litigation expenses incurred by the taxpayer in defending his business against threatened destruction were held to be deductible as ordinary and necessary business expenses, and the case turns on its own clearly distinguishable facts. This Court there reiterated that (p. 475) "Whether an expenditure is directly related to a business or whether it is ordinary and necessary are doubtless pure questions of fact in most instances."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1958.

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